

No. 15726

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ALBERT J. FIHE, ELIZABETH M. FIHE, Husband and  
Wife,

*Petitioners-Appellants,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent-Appellee.*

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APPELLANTS' REPLY BRIEF.

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**APPELLANTS' REPLY BRIEF.**

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*To the Honorable Judges of the United States Circuit  
Court of Appeals for the Ninth Circuit:*

There are some glaring discrepancies and at least one actual misstatement of fact in Respondent's brief which cannot go unchallenged.

**Unfettered Control of Funds.**

On pages 12, 27 and 42, of typewritten brief, Counsel for Respondent states that Petitioners Albert J. and Elizabeth Fihe had "unfettered" control of the funds of the corporation of which they were President and Treasurer, respectively. By innuendo, Respondent's counsel attempts to make this Court believe that the Fihes did appropriate corporate funds to their own use, which funds were never reported as taxable income.

This appears to be a deliberate attempt to make the Court believe that the Petitioners here are the guilty parties, when, in fact, it is undisputed that Harry Holly and the auditor for the corporation both were convicted and served terms in the Federal penitentiary for conspiring to defraud the Government of income taxes.

Respondent's counsel actually belies the statement regarding unfettered control of corporate funds on pages 7 and 16 of the typewritten brief by admitting that all checks drawn on the corporation by either of the Fihees were not valid unless *countersigned* by Holly or his wife. IS THIS UNFETTERED CONTROL?

### Unreported Salary in 1948.

At several points in Respondent's typewritten brief, Albert J. Fihe is accused of having received salary from the corporation in the year 1948 which he did not report, pages 12, 17 and 31.

The actual facts, as borne out by the record, show that Fihe resigned as President of the corporation at the end of the third week in January of 1948. He had been paid his salary of \$400.00 per week up to that time.

Respondent's counsel insists that the corporation paid Fihe an additional amount of \$861.90, which Fihe did not report.

Query is made as to whether any corporation would continue to pay any salary to an officer after he had resigned and sold all his stock in the corporation.

Respondent's only witness, Wiscons, admitted, on cross-examination (record page 149), that he could not understand why any more money was paid Fihe as salary or

anything else in the year 1948, after Fihe had completely severed his connection with the corporation.

The above misstatements and actual falsifications tend to show that Respondent's counsel is trying to discredit the Fihes with this Court when, in fact, the alleged payments made to the Fihes by the corporation were set up on the corporate books long after the Fihes were "out of the picture" and apparently at the instigation of an ex-convict, namely Harry Holly, who was caught in his efforts to falsify the corporate books.

### **The Years 1946 and 1947.**

Respondent's counsel devotes approximately three quarters of the typewritten brief to an analysis and discussion of the returns and additional taxes claimed for the above two years.

As explained in Petitioners' Opening Brief, the alleged discrepancies for these two years are relatively minor, and there is really no point in taking up this Court's time for such small amounts. In fact, Petitioners have indicated their willingness to pay these taxes, but believe that any *penalty* assessment is unfair and uncalled for.

### **Penalties.**

The record and Respondent's brief conclusively show that Fihe employed a firm of certified public accountants to prepare the tax returns for both the partnership and the corporation for the years in question. In fact, amended partnership and other returns, prepared by these accountants Barrow, Wade & Guthrie, are Exhibits G to J, inclusive, here.

It is peculiar that the Judge of the Tax Court gave full credence to the revised partnership and corporation returns prepared by these same accountants, when ever there was a question of additional charges against the Fihes; but, when it came to assessing penalties against the Fihes for incomplete tax returns, the Tax Court completely ignored the fact that these returns were prepared by the same certified public accountants.

**No Penalty Should Be Assessed Against the Fihes at Any Time or for Any Reason—the Year 1948.**

As already fully explained in Appellants' Opening Brief, the additional assessment of taxes for the year 1948 is the main and possibly the only matter for consideration by this Court.

Petitioners' brief, pages 17 and 18, lists two methods of computing the 1948 tax, either of which would be a reasonable assessment.

On the other hand, the Commissioner and the Tax Court decided that the Fihes owed additional taxes for this year in the amount of approximately \$7,000.00.

Respondent's counsel submits a long list of figures in support of this alleged deficiency which, to say the least, simply adds to the confusion.

Perhaps "figures don't lie", but there were so many debits made against the Fihes accounts with the Holly corporation for the year 1948, practically all of which were wholly unsubstantiated (see Wiscons' testimony and admissions) and the Commissioner and Tax Court both arbitrarily disallowed so many proper deductions that there was a resultant additional tax assessment. Petitioners' Opening Brief comments on these unauthorized



and improper disallowances, and there is no point in repeating these comments.

Suffice it to say, that, as A. J. Fihe testified in Court, Harry Holly and his accountants did, after the Fihes sold their stock in the company, completely revise the Corporation books and made many absolutely false debits against the Fihes' accounts. This money went somewhere, but the Fihes never received it. As the trial record shows, both A. J. and Elizabeth Fihe continued to contribute money to the partnership and corporation in amounts averaging \$5,000.00 annually for many years. Any records to the contrary, and particularly those made after the Fihes severed their connection with the company, are absolutely and unqualifiedly false. [Record pp. 165, 171, 172, 211 and 243.]

### 1950 Carry-Back.

Petitioners further contend that, having experienced a severe financial loss in the year 1950, that this loss, when carried back to the year 1948, would eliminate any tax whatever for that year, no matter how figured. Respondent's counsel asserts that such is not in issue in this case, but Petitioners *are certainly entitled to a carry-back* and, therefore, request that the Court consider this question.

### The Ethics, Morals and Equities.

Respondent's brief is entirely silent regarding the status of ex-convict Holly; his participation with the company auditor and an internal revenue agent in a conspiracy to defraud the Government of taxes.

Respondent's brief is also entirely silent regarding the part that the Fihes took in reporting this conspiracy and bringing the culprits to an accounting for their crime.

Respondent's brief also neglects to admit that this action on the part of the Fihe saved the Government untold sums of money, first in the actual matter at issue here and also by discouraging future similar acts by others.

Petitioners are morally, legally and ethically right, and recognition of this situation by this Honorable Court is earnestly solicited.

Respectfully submitted,

ALBERT J. FIHE,

*Attorney for Petitioners-Appellants.*